

UNITED STATES

**RULING: DEFENSE MOTION
TO COMPEL DEPOSITIONS**

DATED: 16 March 2012

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(b) (6) The Defense would like to question him regarding his declaration and the basis for his belief.)

e. (b) (6) USCENTCOM, (b) (6) (Defense proffers (b) (6) will testify concerning his classification review and classification determination concerning the CIDNE Afghanistan Events, CIDNE Iraq Events, other briefings and the BE22 PAX.wmv video. Specifically, (b) (6) will testify concerning his classification determination and his belief of the impact on national security from having this information released to the public.)

f. (b) (6) (b) (6) (Defense proffers that Government has not provided contact information for (b) (6); that (b) (6) will testify concerning his review of the disclosure of Department of State Diplomatic Cables stored within the Net-Centric Diplomacy server and part of SIPDIS. (b) (6) will testify concerning his classification determination and the impact of the release of the information on national security.)

g. (b) (6) Joint Task Force – Guantanamo (JTF-GTMO), (b) (6) (b) (6) (Defense proffers that (b) (6) will testify concerning his review of the disclosure of five documents, totaling twenty-two pages. (b) (6) will testify concerning his classification determination and his belief regarding the impact of the release of the information on national security).

h. (b) (6) (b) (6) (Defense proffers that the government has not provided contact information for (b) (6)).

2. Defense argues the requested depositions of (b) (6) are needed because the witnesses were essential witnesses and should have been produced in person at the Article 32 hearing. An additional ground for the remaining depositions is that the Article 32 Investigating Officer improperly determined that the witnesses were not reasonably available at the Article 32 hearing. The witnesses were essential witness and should have been produced in person at the Article 32 hearing. Defense further argues that the depositions are necessary because the Government impeded Defense access to interview the witnesses.

Factual Findings:

The Court adopts the following factual findings as stipulated to by the parties:

1. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010).

2. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 IO. The charges were referred without special instructions to a general court-martial on 3 February 2012.

3. The Defense requested the OCAs' classification determinations during discovery on 15 November 2010. On or about November 2011 the Defense had all of the OCA classification determinations.

4. On 2 December 2011, the Defense submitted its witness list to the Article 32 Investigating Officer (IO), naming the seven OCAs. The witness list did not include (b) (6). On 7 December, the Government responded to the Defense's witness list. The Government objected that (b) (6) was not relevant. The Government requested the IO to find each OCA not reasonably available for the Article 32 given his duty position because the difficulty, delay, and effect on military operations outweighed the significance of his testimony under MRE 405(g)(1)(B). On 8 December 2011, the Defense challenged the Government's position that the OCAs were not reasonably available.

5. On 14 December 2011, the IO made his determinations regarding defense requested witnesses. In relevant part, the IO found:

(b) (6) – not relevant to the form of the charges, the truth of the charges or information as may be necessary to make an informed recommendation as to disposition; specifically; whether three Apache gun videos that were sent to his Division were not classified at the time of their alleged release and whether they should have been, recognizing that the government states the video is not classified and doesn't allege it is classified, is not relevant to a determination as to whether PFC Manning committed the charged offenses and, if so, what the disposition of those charges should be.

(b) (6) – not reasonably available because while his testimony is relevant, he is located in Florida and is CENTCOM's (b) (6); the significance of his expected testimony with respect to his classification determinations concerning the two PowerPoints at issue does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

(b) (6) – not reasonably available because while his testimony is relevant, he is (b) (6) Chief Classification Advisory Officer; the significance of his expected testimony with respect to his classification determinations concerning the alleged chat logs between (b) (6) and PFC Manning does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

(b) (6) - not reasonably available because while his testimony is relevant, he is (b) (6) (b) (6); the significance of his expected testimony with respect to his classification determinations concerning the alleged chat logs between (b) (6) and PFC Manning does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

(b) (6) - not reasonably available because while his testimony is relevant, he is located in Florida and is CENTCOM's (b) (6); the significance of his expected testimony with respect to his classification determinations concerning the CIDNE Afghanistan events, CIDNE Iraq Events, other briefings, and the BE22 PAX.wmv video does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

(b) (6) - not reasonably available because while his testimony is relevant, he is the (b) (6) (b) (6); the significance of his expected testimony with respect to his classification determinations concerning diplomatic cables does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

(b) (6) - not reasonably available because while his testimony is relevant, he is Commander of (b) (6); the significance of his expected testimony with respect to his classification determinations concerning the documents at issue does not outweigh the difficulty, expense, and effect on military operations of obtaining his presence in the investigation.

6. The Defense also objected to the IO considering the OCA affidavits submitted IAW 28 U.S.C. 1746.
7. While the IO was pondering whether to consider the OCA affidavits, the Government offered to have the OCA testify telephonically. The defense objected to telephonic testimony.
8. On 23 January 2012, the Defense filed a Request for Oral Deposition with the General Court-Martial Convening Authority (GCMCA). On 1 February 2012, the GCMCA denied the Defense's request finding the IO did not improperly determine that the witnesses were not reasonably available and because there is no evidence that the witnesses will be unavailable for trial if found relevant and necessary.
9. On 20 January 2012, the Defense filed a Discovery Request asking for complete contact information for three OCAs. On 27 January 2012, the Government responded that it would not provide contact information for the OCAs because they were not Government witnesses but if they became Government witnesses, the Government would assist in coordinating meetings for defense interviews.
10. On 1 February 2012, the Defense advised the Government of its intent to explore calling the OCAs as witnesses and asked for contact information. On 1 February 2012, the Government advised the Defense it would provide contact information and start working with each organization to determine the best way for the defense to contact them. On 29 February 2012 the Government has provided contact information for (b) (6)
11. The Government advised the Court that for the 2 non-DoD OCA, the Defense may have to file a request with the agency to interview the OCA IAW *Touhy* regulations promulgated IAW 5 U.S.C. 301. Defense disputes that *Touhy* applies when the U.S. is a party, citing *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 66 (D.D.C. 1998). The Government offered to assist the Defense in contacting the OCA and in the *Touhy* process, if applicable.

The Law:

1. Article 49, UCMJ and RCM 702 govern depositions in courts-martial. RCM 702 provides that a deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an Article 32 investigation or for trial.
2. The purpose of a deposition is to preserve the testimony of an unavailable witness. Article 49(d) and analysis to RCM 702(a).
3. Both Article 49 and RCM 702 states that a request for deposition may be denied only for good cause. The discussion to the rule provides that the fact that a witness is or will be available for good cause in the absence of unusual circumstances, such as the improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the Government has improperly impeded defense access to a witness.
4. RCM 405(g)(1)(A) and (g)(2)(a) provide that a relevant witness, to include a witness who is timely requested by the accused, who is not cumulative shall be produced if reasonably available. The investigating officer (IO) determines whether a requested relevant witness is reasonably available. A witness is "reasonably available" when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance.

5. RCM 405(g)(4)(B) provides in relevant part that the Article 32 IO can consider sworn statements over the objection of the defense if the witness is not reasonably available. RCM 405 does not provide authority for the IO to consider unsworn statements over the objection of the defense if the witness is not reasonably available.

6. 28 USC 1746 provides in relevant part "Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same, such matter may, with like force and effect be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him as true under penalty of perjury, and dated in substantially the following form: (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

7. RCM 405(g)(4)(B) is a law of the United States for purposes of 28 USC 1746 that allows proof of a matter by sworn statement. An Article 32 IO may consider an affidavit filed IAW 28 USC 1746 to the same extent he/she considers a sworn statement. Unsworn declarations under 28 USC 1746 are elevated to the level of sworn statements because they subject the declarant to the penalties of perjury under the United States Code and False Swearing under Article 134, UCMJ (element 1 – that the accused took an oath or an equivalent).

8. A witness has no obligation to submit to a pretrial interview. *U.S. v. Morgan*, 24 MJ 93 (CMA 1987). The Government may not induce a witness to refuse to answer questions of defense counsel. *U.S. v. Killebrew*, 9 MJ 154 (CMA 1980).

Analysis:

1. The IO's determination regarding the requested Defense witnesses was not an improper denial. The IO properly balanced the significance of each witness' testimony against the difficulty, expense, and effect on military operations of obtaining that presence in the investigation.

2. The IO properly considered the OCA affidavits IAW 28 USC 1746. This statute provides that such affidavits may be used as proof under any law of the United States where any matter is required or permitted to be proved by sworn statement. RCM 405(g)(4)(B) is such a law.

3. Military cases addressing deposition as a remedy for an Article 32 investigation where the IO improperly denied production of an essential witness such as a key witness providing the only direct evidence of a crime or the victim of a sexual assault. Unlike such witnesses, the OCA providing classification reviews are not essential witnesses.

4. The Government has not impeded the Defense access to the OCA. Recognizing the challenges of coordinating interviews with government witnesses in high level positions, the Government has volunteered to assist the defense in coordinating interviews and in any applicable *Touhy* process.

5. There is no evidence that any of the witnesses will be unavailable for trial should they be deemed relevant and necessary.

6. There is good cause to deny the request for depositions for all of the witnesses.

RULING: Defense Motion to Compel Depositions is **DENIED**.

ORDERED, this the 16th day of March 2012.

A handwritten signature in black ink, appearing to read "DL", is positioned above the printed name.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit